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Nos. 80-1208, 80-1471 and 80-1610

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

NEW ENGLAND POWER COMPANY,
APPELLANT,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION,
ET AL.,
APPELLEES.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE LEGISLATIVE UTILITY
CONSUMERS' COUNCIL,
APPELLEE.

DENNIS J. ROBERTS II, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION,
ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

Brief *Amicus Curiae* of the New England Legal Foundation and the New England Council, Inc.

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Statement of Issues Presented.

1. Does the action of the New Hampshire Public Utilities Commission restricting the economic benefits of hydroelectric power generated in the State exclusively to New Hampshire customers violate the Commerce Clause of the Federal Constitution (Art. I, § 8, cl. 3)?

2. Does the action of the New Hampshire Public Utilities Commission regulating interstate wholesale electricity rates violate the Supremacy Clause of the Federal Constitution (Art. VI, cl. 2)?

3. Is the "savings clause" of the Federal Power Act (Section 201(b)) an affirmative grant of authority from the Congress to New Hampshire permitting the regulation of interstate wholesale electricity rates?

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Brief *Amicus Curiae* of the New England Legal Foundation and the New England Council, Inc.

Interest of Amici Curiae.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation organized under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on public interest matters. NELF represents the public interests of citizens in the six New England states in judicial and administrative proceedings which affect their economic rights and opportunities. Policy for NELF is formulated by a Board of Directors consisting of attorneys, businessmen and educators. The Board, through its Legal Review Committee, all members of which are attorneys, evaluates the merits of any contemplated legal action and authorizes such action only where the position of the Foundation has broad support in the general community.

NELF has long been interested in the protection of the economic interests of businesses and individuals. When any individual, any collection of individuals, or any corporate or other legal entity, chooses to engage in lawful economic conduct, it should be protected from restrictions imposed in violation of well-established constitutional principles. NELF has been active in its opposition to such restrictions, most recently filing an *amicus curiae* brief challenging a hiring preference and percentage quota for state and local residents on public works construction projects. *Massachusetts Council of Construction Employers v. Kevin H. White, Mayor of the City of Boston*, Mass. S.J.C., No. 2424 (filed March 20, 1980). Similarly, NELF has represented the citizens, businesses, and municipalities of Connecticut in litigation arguing the inequities of the economic costs resulting from airborne pollutants generated by New York and New Jersey. *New England Legal Foundation v. Douglas M. Costle*, 623 F.2d 936 (2d Cir. 1980) (No. 79-6202).

NELF has also been active in energy related matters, having participated in litigation to determine drilling rights for

oil and gas on Georges Bank, *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979), and having intervened in an administrative hearing before the Environmental Protection Agency to argue in support of the development of an oil refinery in Eastport, Maine. *In re The Pittston Company, NPDES Permit Application No. ME 0022420.*

The New England Council, Inc. (the Council) is a non-profit association of over 1,200 New England employers seeking to improve the economic conditions of the region by influencing national and regional decisions.

In 1980 the Council successfully opposed the anti-nuclear referendum in Maine; consulted with New England companies on EPA regulations affecting the handling of hazardous and toxic materials; worked to educate coastal communities on the pending Outer Continental Shelf oil and gas exploration projects; fought legislation excessively restricting the development of energy resources in Alaska; and consulted directly with the New England Congressional delegation on the Georges Bank Protection Act, the Nuclear Regulatory Commission Authorization Bill, the Alaska Lands Bill, and coal conversion legislation.

Thus far in 1981, the Council has been involved in the decision of the Federal Energy Regulatory Commission to approve the Tennessee Pipeline Project, is working with a number of public and private sector groups to develop a bipartisan review of the Clean Air Act, and has completed a series of six statewide energy briefings on price and availability of energy supplies.

NELF and the Council contend that the Order of the New Hampshire Public Utilities Commission, as affirmed by the New Hampshire Supreme Court, is a discriminatory economic regulation prohibited by the Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3). They file this brief in support of the Appellants with the consent of all

parties. Copies of Appellants' and Appellees' letters of consent are on file with the Clerk of this Court. The Foundation and the Council adopt Appellants' Statements of Facts and Parties.

Introduction.

New England Power Company (NEP) is a public utility which generates and transmits electricity at wholesale in interstate commerce. Its principal customers are three affiliates[1] which resell the electricity at retail to over one million customers in Massachusetts, Rhode Island and New Hampshire. Sales are also made to a small number of non-affiliated utilities, the majority of which are municipal light departments in Massachusetts. A significant portion of NEP's total generating capacity consists of hydroelectric units on the Connecticut River in New Hampshire.[2] These units are licensed by the Federal Regulatory Commission (FERC), successor to the Federal Power Commission, under Part I of the Federal Power Act, 16 U.S.C. §§ 792, *et seq.*

NEP is also a member of a voluntary electricity pooling group, New England Power Pool (NEPOOL). This entity was created formally in 1971, although predecessor energy co-operatives had existed since the 1950's. NEPOOL consists of 60 utilities in the six New England states, incorporating more than 98% of all the generating capacity in the region and nearly all of the transmission network for the delivery of electricity. Joint App. at 30a. The NEPOOL agreement requires each member to submit its bulk generation and transmission facilities to the control of an integrated central dispatch cen-

[1] Massachusetts Electric Company, Narragansett Electric Company, and Granite State Electric Company.

[2] The generating capacity of NEP's Connecticut River hydroelectric plants is approximately 420 megawatts. A megawatt is the equivalent of one million watts.

ter called NEPEX.[3] This dispatch center coordinates all facilities of member companies to ensure overall system reliability and maximum economies of scale through the best economic mix of the various types of generating facilities. *Id.* at 34a. NEPOOL estimates that in 1979 its central dispatch system saved New England over 44 million dollars compared to the costs of independent generation by each company.

On November 21, 1979, the New Hampshire Public Utilities Commission (PUC) invoked for the first time a 1913 statute, N. H. Rev. Stat. Ann. 374:35, requiring utilities which operate hydroelectric facilities in the State to obtain permission to transmit electricity out-of-state. This invocation took the form of an investigation by the PUC to consider whether it should withdraw permission previously granted NEP to transmit hydroelectric energy generated in New Hampshire to locations in Massachusetts and Rhode Island.

The PUC issued its Report and Order on September 19, 1980, providing that:

> [P]ermission granted New England Power Company (NEPCO) to transmit hydroelectric energy from within the boundaries of the State to outside the State is hereby withdrawn [and] . . . that NEPCO make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State. . . . NEP Juris. St., App. C., at 40a.

Although the direction of the Order appears unequivocal, its effect requires explanation. Despite the express prohibition contained in the Order, the interstate transmission of electricity generated by the water powered turbines owned by NEP and located in New Hampshire will not be physically

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[3] Centralized dispatch means that units are operated regardless of ownership or geography, and the transmission capability of the pool allows power to flow in such a way that the total costs to the pool are minimized. NEP Juris. St. at 4.

interdicted. The staff witness for the PUC testified that such electricity will be applied to the benefit of electric customers in New Hampshire through new sales contracts with in-state utilities. Joint App. at 38a. Similarly, the technical expert for NEP concluded that while it is physically possible to prohibit the export of hydroelectricity, such an action would deprive the State of the advantages of the central economic dispatch system operating in the New England region. *Id.* at 36a.

The NEP hydroelectric facilities, therefore, will not be physically removed from the flow of interstate commerce, but will remain interconnected to the power grid of New England. In practice, once power is transmitted into the NEPOOL grid, it is impossible to identify the source of specific kilowatts. The Order of the PUC, then, can be characterized as compelling only a modification in billing, and thus in rates. The Order utilizes an accounting mechanism to achieve its purpose of resetting rates between NEP and its retail utility customers; it increases rates to utilities in Massachusetts and Rhode Island and lowers rates for utilities in New Hampshire, thus limiting the economic benefits exclusively to in-state suppliers and customers.

These consequences were confirmed by the Opinion of the New Hampshire Supreme Court. NEP Juris. St., App. A. at 1a. After restating the language of the PUC Order the Court abandoned the concept of a physical restriction, conceding that once the power is generated it is immediately mixed into the grid. In order, therefore, to achieve the stated objective of the PUC Order, the Court concludes that NEP must reassign through an accounting procedure all hydropower to customers in New Hampshire. *Id.* at 11a-12a. The Opinion reinforces the fact that what is required is an alteration of wholesale electric contracts and rates, not a prohibition of the physical exportation of power.

NELF and the Council contend that the action of the New Hampshire PUC as approved by the New Hampshire Supreme Court establishes a discriminatory economic preference for New Hampshire electricity customers to the substantial disadvantage of customers in Massachusetts and Rhode Island in derogation of the protections of the Commerce Clause and Supremacy Clause of the United States Constitution. The PUC is effectively setting interstate wholesale electric rates, a function specifically retained by the federal government and delegated by the Congress to the Federal Energy Regulatory Commission in the Federal Power Act.

Argument.

I. The Order of The New Hampshire Public Utilities Commission on its Face Violates the Proscriptions of the Commerce Clause of the Federal Constitution by Creating a System of Economic Protectionism for New Hampshire Electricity Customers.

The instant case appeals for judicial intervention not only to correct a misapplication of the law and the Federal Constitution, but also to blunt what have been appropriately termed the "centrifugal, isolating, or hostile forces of localism," Brown, "The Open Economy: Mr. Justice Frankfurter and the Position of the Judiciary," 67 Yale L.J. 219, 220 (1957), and to give proper emphasis to the "centralizing forces of nationhood and union." L. Tribe, *American Constitutional Law* 319 (1978).

The history of this Court's analysis of the Commerce Clause is replete with allusions to the evils of economic isolationism and protectionism. As expressed by Mr. Justice Jackson for the Court in *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949):

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527, "what is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation." In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition. *Id.* at 537-38.

While this Court has been cognizant of the acceptability of incidental burdens on interstate commerce when necessary to assure a state's protection of the public health and safety, it has moved swiftly to condemn cases of simple economic protectionism cloaked in the mantle of health and safety regulation. In fact, the Court has erected a virtual *per se* rule of invalidity against state statutes which restrain or prohibit the free flow of commerce from or into its jurisdiction. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

More specific to the facts of the present case are those instances in which the Commerce Clause has provided the basis for invalidation of state laws arguably designed for conservation of natural resources, but in fact intended to place nonresidents at a commercial disadvantage. In a case uniquely similar to the instant one, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), this Court held that a statute of a state which produced natural gas could not be drawn so as to require that resident consumers be given a preferred right of purchase over nonresidents. The Court stated that "[T]he provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the

diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant states, and therefore will work a serious interference with commerce." *Id.* at 597. This Court also held a Louisiana law requiring in-state processing of shrimp caught in state waters to be a violation of the Commerce Clause, declaring that, "Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States and a state statute that operates directly to burden any of its essential elements is invalid. (citations omitted)" *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).

The rationale for these cases was set forth in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). While holding invalid a New York statute placing restrictions upon the sale within the state of milk produced in other states, Mr. Justice Cardozo stated the basic principles applicable to instances of economic protectionism:

> "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." [Citations omitted.] . . . We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." [Citations omitted.] . . . If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. *Id.* at 522.

The Court observed further that the inevitable link between economic welfare and health would, if permitted to justify the New York statute, forever enable a state to evade

the limitations of the Commerce Clause under the guise of the legitimate exercise of the police power.

> To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division. *Id.* at 523.

The evils sought to be remedied by the Commerce Clause principles articulated by Justice Cardozo in *Baldwin* are precisely those presented by New Hampshire's reliance on a 1913 statute to impose an economic unevenness on electric consumers in Massachusetts and Rhode Island. Effectively, New Hampshire requires as a condition of the free flow of hydroelectricity across its borders that those citizens of her sister states which consume 90% of the hydroelectric power generated by NEP in New Hampshire subsidize substantially lower rates for New Hampshire citizens. Under whatever guise, this scheme is economically motivated and derogates the principles of the Commerce Clause.

Nor is the state action in this case comparable to the activities which this Court held not to provoke Commerce Clause scrutiny in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). In *Alexandria*, the Court rejected a Commerce Clause challenge to a Maryland statute under which the state paid a bounty to scrap processors for the destruction of any vehicle formerly titled in Maryland, and differentiated in the proof of title required of in-state and out-of-state processors. The Court drew a distinction between the state as a regulator of the natural functioning of the interstate market through prohibitions or burdensome restrictions, and the state as a market participant, bidding up prices. 426 U.S. at 806. It con-

cluded that "[N]o trade barrier of the type forbidden by the Commerce Clause . . . impedes their movement [junk automobiles] out of State . . . [T]hey remain in Maryland in response to market prices. . . ." *Id.* at 809-810.

The *Reeves* case involved a South Dakota practice during periods of cement shortages which confined sales of cement from a state-owned plant solely to state residents. The Court, in sustaining the state action, found the *Alexandria* distinction between "market regulator" and "market participant" controlling. Once a state is participating in the market, it may give preference to its own citizens and have much the same freedom as a private business. 447 U.S. at 436. However, state *regulatory* powers are constrained by the Commerce Clause. *Id.* at 437.

In the instant case, the New Hampshire PUC is functioning as a regulator of hydroelectric power rates and restricting the unimpeded transmission of this energy across state lines. The State neither owns nor operates the generating facilities (*Reeves*); nor has it actively entered the market as a purchaser or supplier (*Alexandria*). Its sole function is to restrain commerce by regulatory restrictions in order to ensure an economic advantage for in-state suppliers and consumers of hydroelectric power. This role necessitates Commerce Clause scrutiny.

In recent years, this Court has utilized a three-part inquiry for Commerce Clause analysis:

> (1) whether the challenged statute regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and (3) if so, whether alternative means could promote this local purpose as well without discriminating against interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

See also, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Great Atlantic & Pacific Tea Company v. Cottrell*, 424 U.S. 366 (1976).

Under this standard, the burden of demonstrating discrimination rests on the party challenging the validity of the statute, but " 'When discrimination against commerce [is] demonstrated, the burden falls on the State to justify [its action] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.' " *Hughes v. Oklahoma*, 441 U.S. at 336, quoting *Hunt v. Washington Apple Advertising Comm'n.*, 432 U.S. 333, 353 (1977). Furthermore, when the Court considers the purpose of a challenged statute, it is not bound by "[t]he name, description, or characterization given it by the legislature or the courts of the State," but will determine for itself the practical impact of the law. *Id.* at 336. (citations omitted)

The action of New Hampshire in the instant case is facially discriminatory against interstate commerce. The PUC Order clearly states its objective to discriminate in favor of New Hampshire customers of hydroelectric power. While the Report and Order, NEP Juris. St., App. C., are framed in terms of the public good and preservation of natural resources, both the public good and the State's resources are to be preserved by economic discrimination in wholesale rate-setting and measured by the local economic benefits generated thereby. The effect of the Order is similar—it compels preparation by NEP of new utility contracts which will result in higher prices for out-of-state suppliers and consumers to accomplish New Hampshire's subsidizing objective. While the Order does not "overtly prohibit" the interstate passage of electrons, it clearly does "block the flow of interstate commerce at [the] State's border," *Philadelphia v. New Jersey*, 437 U.S. at 624, by interdicting the transmission of the direct benefits of that commerce for impermissible

reasons of economic protectionism. Where simple economic protectionism is effected by state action, a virtual *per se* rule of invalidity applies. See, e.g., *H. P. Hood & Sons, Inc.*, 366 U.S. at 538-539; *Toomer v. Witsell*, 334 U.S. 385, 403-406 (1948); *Baldwin*, 294 U.S. at 522-523; *Philadelphia*, 437 U.S. at 623-624.

This facial discrimination by itself may be a fatal defect under the test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), regardless of the purported state objective, since it is well established that "the evils of protectionism can reside in legislative means as well as legislative ends." *Philadelphia*, 437 U.S. at 626. At a minimum, such facial discrimination "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. at 337. While the State of New Hampshire asserts "public good" and "conservation" rationales for its regulation, the "scope of legitimate state interests in 'conservation' is narrower" under this strict analysis. "The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of 'conserving' the wild animals within its borders when equally effective nondiscriminatory conservation measures are available." *Id.* The scope of New Hampshire's conservation interests becomes narrower still given the unabashed declaration by the PUC that its objective, through the wholesale rate-setting mechanism required by invocation of N.H. Rev. Stat. Ann. 374:35, is to promote an economic advantage for its consumers over other electric users in the region. New Hampshire should not be heard to claim a proprietary interest in the navigable waters of the Connecticut River, from which hydroelectric energy is extracted by private interstate businesses, in order to justify a ban on exportation of that energy across state borders.

It is precisely this lack of even-handedness in the treatment of extra- and intra-state economic interests that this Court

has so often condemned. See *Lewis v. B. T. Investment Managers*, 447 U.S. 27 (1980); *Commonwealth Edison Co. v. Montana*, __ U.S. __, 49 U.S.L.W. 4957 (July 2, 1981); and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The principle was most recently enunciated by Mr. Justice Marshall in upholding a Montana tax on coal. In evaluating the state action under the test in *Complete Auto Transit*, the Court asserted:

> [T]he Montana tax is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this even-handed formula. We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other "discrimination" cases. [citations omitted] *Commonwealth Edison v. Montana*, 49 U.S.L.W. at 4959.

Finally, far from choosing a less restrictive regulatory alternative, New Hampshire has chosen to protect its purported 'conservation' interests in a manner which most severely discriminates against interstate commerce. It has banned the exportation of the economic benefits of hydroelectric energy, thus compelling consumers in Massachusetts and Rhode Island to bear a heavier burden of costs. While the State of New Hampshire eloquently narrates the facts of an expanding economy, increased population, and inadequate mix of energy resources, NEP Juris. St., App. C, its action contravenes the most effective manner of providing its citizens with a manageable and sufficient energy supply—namely, equal participation in NEPOOL. The act of denying hydroelectric benefits to other customers in the region is the parochialism which the framers of the Federal Constitution anticipated in the Commerce Clause. *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911). Surely the action of New

Hampshire cannot stand when juxtaposed against Mr. Justice Jackson's concluding statement in *H. P. Hood & Sons, Inc.*:

> Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. 336 U.S. at 539.

II. The Order of the New Hampshire Public Utilities Commission Violates the Supremacy Clause of the Federal Constitution.

None of the parties seriously contests that in the absence of a valid Congressional authorization the New Hampshire PUC Order violates the Constitutional strictures against state regulation of interstate commerce. The Order, however, is also in open conflict with both Parts I and II of the Federal Power Act, 16 U.S.C. §§ 792, *et seq.*, and must therefore fail under the Supremacy Clause, Article VI, of the Federal Constitution. This conflict, moreover, serves to underscore the interpretation that § 201(b) of the Act is not an affirmative grant of authority, but rather a savings clause which delineates the preemptive effect of the federal statute. See Argument III, infra.

Preemption analysis begins with the assumption that traditional state police power is not to be superseded unless such was the clear and manifest intent of the Congress. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). It is the exercise of police power by the states which warrants the deference of an assumption of validity and not the exercise of simple

economic protectionism, whatever its guise. However, even assuming *arguendo* that the PUC's declared intention of reserving for its own citizens the economic benefits of NEP's hydroelectricity is within the realm of its historic police powers, the Order yet collides with the principle of federal supremacy.

As this Court noted in *Ray*, Congress may evidence its preemptive intent in any of several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that no room was intended to remain for supplementation by the states. *Pennsylvania R. Co. v. Public Service Comm.*, 250 U.S. 566, 569 (1919). Or the statute may govern an area of activity in which the federal interest is so dominant that it is presumed to preclude state regulation of the same activity. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

Even if Congress has not completely foreclosed the exercise of state authority in a particular field, a state statute regulating the area is void to the extent that it actually conflicts with federal law. This conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . .," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67; *Jones v. Rath Packing Co.*, 430 U.S. at 526, 540-41. State action must be invalidated, therefore, if its effect is to discourage or prohibit conduct that federal action is intended to encourage, *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967), or if it encourages or mandates conduct whose absence would aid in the effectuation of the federal scheme. *Jones v. Rath Packing Co.* The courts look to the scope and pattern of federal legislation in order to determine its preemptive effect. *Ray*, 435 U.S. at 163.

When the veil of the purported 'conservation' interest is pierced in this matter, the Order of the PUC is seen as in truth nothing more than a requirement for the restructuring of the wholesale electric rates of NEP customers. It requires a bookkeeping adjustment whereby the economic benefits of NEP's hydroelectric power are transferred to New Hampshire customers exclusively. Correspondingly, it mandates that the rates of customers in Massachusetts and Rhode Island be raised to reflect the loss of the cheaper hydroelectric component of the NEP rate structure.

The PUC Order, therefore, has two effects: (a) practically, it alters the rates charged to New Hampshire consumers and to NEP consumers in Massachusetts and Rhode Island; and (b) theoretically, it prohibits transmission of electricity intended for interstate commerce. Neither consequence was intended by the Congress to be authorized to the states, and neither survives Commerce or Supremacy Clause scrutiny.

Part I of the Federal Power Act, originally enacted as the Federal Water Power Act of 1920, is more than the mere licensing provision which the court below describes. It was adopted by Congress in large part to "promote the comprehensive development of the water resources of the Nation. . . ." *First Iowa Hydroelectric Corp. v. Federal Power Commission*, 328 U.S. 152, 180 (1946). "The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 99 (1965); and see legislative history, *id.* at n.13. The Act was intended to serve a national purpose, and it established a comprehensive federal statutory scheme to achieve this end.

The Federal Power Act governs utilities which participate in energy pooling systems such as NEPOOL, *Federal Power Comm'n. v. Florida Power & Light Co.*, 404 U.S. 453 (1972),

reh. den., 405 U.S. 948 (1972), and where such an interstate pool exists, jurisdiction of the federal statutory scheme is not dependent upon scientifically tracing the actual flow of electricity into the interstate stream. *Arkansas Power & Light Co. v. Federal Power Comm'n.*, 368 F.2d 376 (8th Cir. 1966). The NEP hydroelectric plants whose output is currently at issue are subject to regulation by FERC under the Federal Power Act. NEP Juris. St. at 4-5.

Far from encouraging the development of hydroelectric power to meet the needs of an expanding national economy, the PUC Order is designed solely to restrict the benefits of that power to the New Hampshire economy. Moreover, it will have the inevitable and undesired effect of discouraging hydroelectric development within New Hampshire by any company other than one whose customers are exclusively New Hampshire residents.[4] Such effects create an irresolvable conflict with the purposes and intent of Part I of the Act, and the Supremacy Clause demands that the federal enactment prevail.

The PUC Order is also preempted by Part II of the Act, which was adopted by Congress in the wake of this Court's ruling in *Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). In *Attleboro* state regulation of interstate wholesale electricity transactions was held to contravene the Commerce Clause. The gap in regulation was thereafter bridged by Congress with Part II of the Federal Power Act, establishing a comprehensive Federal regulatory scheme governing the transmission and sale of wholesale electricity in interstate commerce. The Federal Power Com-

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[4] Such was in fact the unwanted effect of a similar statutory restriction in Maine, and led to the repeal of the Maine statute in 1955. Me. Rev. Stat. title 68 § 1, repealed 1955 Me. Acts c.402, p. 400. And see, Maine Legislative Record, Senate, April 26, 1955, at 1310; House, May 17, 1955, at 2302, 2305, *et seq.*

mission, later succeeded by the Federal Energy Regulatory Commission (FERC), was given authority to regulate the field, except for that portion lawfully within the realm of state regulation. §§ 201(a) and (b), 16 U.S.C. § 824.

When properly viewed as a rate determination for interstate wholesale electricity, the PUC Order quite clearly conflicts with the rate-setting authority vested in FERC and the Congressional guidelines for the exercise of that authority. Congress declared that rates shall be "just and reasonable," shall be determined without "preference or advantage," and shall not create any unreasonable rate differential "as between localities." § 205, 16 U.S.C. § 824(d). Compliance with the PUC Order, however, will require NEP to apply for FERC approval of a new rate structure which will unreasonably deny its non-New Hampshire customers an accepted (historically, as well as by FERC) measure of a just and reasonable rate: the lower operating costs of the hydroelectric portion of NEP generating capacity. The required new rate structure will, moreover, certainly create a preference on the basis of localities, as New Hampshire customers of NEP will enjoy lower rates than those in other states.

The PUC Order, by purporting to regulate the interstate flow of electricity, by in fact regulating its interstate wholesale rate, and by effectively influencing the use of the nation's navigable waterways in the production of hydroelectric energy, creates a severe and irredeemable conflict with the purposes, structure, and methods of the Federal Power Act. It must, as a result, be struck down under the Commerce and Supremacy Clauses of the Federal Constitution.

III. The "Savings Clause" of § 201(b) of the Federal Power Act Does Not Provide an Affirmative Grant of Authority for New Hampshire to Regulate Wholesale Rates of Hydroelectric Power.

In ruling upon the constitutional validity of the PUC Order restricting the flow of economic benefits beyond state bound-

aries, the New Hampshire Supreme Court itself acknowledged that this form of state action would run afoul of traditional Commerce Clause analysis, but for the alleged affirmative grant of authority contained in § 201(b) of the Federal Power Act, 16 U.S.C. § 824(b). NEP Juris. St., App. A., at 10a. Section 201(b) provides, in pertinent part:

> [T]he Provisions of this Part . . . shall not . . . deprive a State or State Commission of its *lawful authority now exercised* over the exportation of hydroelectric energy which is transmitted across a state line. 16 U.S.C. § 824(b) (emphasis supplied).

As this Court articulated in *Lewis v. B. T. Investment Managers*:

> Congress, if it chooses, may exercise this power [regulation of interstate commerce] indirectly by conferring upon the State an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. 447 U.S. at 44, and cases cited.

See also *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

The reading given § 201(b) of the Federal Power Act by the State of New Hampshire, however, is overly broad. Any exception to a clear invocation of Congressional power to regulate a national activity must undergo a restrictive reading. As Mr. Justice Blackmun described in *Lewis*, in commenting upon the effect of a section of the Bank Holding Company Act of 1956[5] offered by the State of Florida to justify its regulation of foreign state holding companies:

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[5] The language of the Bank Holding Company Act interpreted by the Court follows:

> "The enactment . . . shall not be construed as preventing any state from exercising such powers and jurisdiction which it *now or may hereafter* have. . . ." 12 U.S.C. § 1846 (emphasis supplied).

> This section was intended to preserve existing state regulations . . . But we find nothing in its language or legislative history to support the contention that it was also intended to extend to the States new powers to regulate . . . that they would not have possessed absent the federal legislation. Rather, it appears that Congress' concern was to define the extent of the federal legislation's preemptive effect on state law. . . . [O]ne Committee Report stated that it was intended "to preserve to the States those powers which they now have in our dual banking system." . . . Far from creating a new state power to discriminate . . ., the legislative history evinces an intent to forestall such a broad interpretation. 447 U.S. at 48-49.

Despite the expansive language of the provision considered in *Lewis*, (broader, in fact, than that contained in § 201(b)), the Court rejected the State's interpretation. Similarly, § 201(b) can stand only for the limited purpose of preserving and defining those lawful powers which states had in 1935 over hydroelectric energy. On its face § 201(b) saves only the "lawful power now exercised." It does not distinctly and unequivocally grant authority to states to expand their regulatory activities over hydroelectric power; it merely preserves existing authority. *United States v. Public Utilities of California*, 345 U.S. 295 (1953). As the Court noted in the California PUC case,

> The provision [§ 201(b)] certainly does not go beyond that of § 201(a), noted in the opinion, in limiting federal authority. This is true, not only because of the substantial similarity of the language, but also because it appears not to have been drafted with state rate regulation in mind. Rather, 79 Cong. Rec. 10527 indicates that the provision was intended to preserve the validity of certain

> state statutes prohibiting or regulating the volume of state power exported. *Id.* at 300-301 n.4.

Both historical and legislative developments reinforce this conclusion.

In 1920 Congress adopted what is now codified as the Federal Power Act, Part I. 16 U.S.C. §§ 792, *et seq.* This Act, supported by federal authority over the nation's navigable waters, provided for federal licensing of hydroelectric generating projects. Section 20 of the Act specifically limited state authority to set interstate electric rates. 16 U.S.C. § 813. This enactment presaged an increasing role for the federal government in regulating interstate electric rates. It reflected an understanding on the part of Congress that the availability and price of electric power had become a national concern which required some degree of national attention.

Following the 1920 law, this Court in 1927 emphatically declared that state authority to control interstate electric rates and transmission was severely limited. In *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), the Public Utilities Commission of Rhode Island had established a schedule of prices for the sale of electricity in interstate commerce. The effect of this price regulation was to increase electric costs for Massachusetts consumers. The Court, in condemning this interstate discrimination, concluded that "[t]he rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests. . . ." 273 U.S. at 90.

Prior to 1935, therefore, and the enactment of Part II of the Federal Power Act, which contains § 201(b), state regulation of interstate wholesale electric rates did not exist, a fact later confirmed by this Court. In *Public Utilities Commission of California*, a California electric company had sought a rate increase for the power supplied to customers in Nevada. After determining that the transmission of electricity across

state boundaries is clearly interstate commerce, the Court summarily rejected the argument that states have any authority to regulate interstate electricity for resale. "*Attleboro* declared state regulation of interstate transmission of power for resale forbidden as a direct burden on commerce." 345 U.S. at 304.

The boundaries between areas of state and federal concern drawn by *Attleboro* remain unchanged by Part II of the Federal Power Act, and New Hampshire cannot rely upon § 201(b) to overcome what would clearly have been a Commerce Clause violation under the rule of *Attleboro* prior to the enactment of Part II in 1935. The interpretive guidance offered by Mr. Justice Blackmun in *Lewis* teaches that the language "lawful authority now exercised" is nothing more than a savings clause, and may not be read to grant New Hampshire greater authority than it had lawfully exercised prior to the enactment. It would be at best an exceedingly strained reading of Congressional intent to conclude that, at a time when Congress chose to assert greater federal control over the interstate flow of electric power, it would simultaneously expand beyond existing limits the authority of states in the same field, even to the point of permitting state-authorized conflicts with the expressed purposes of the federal scheme. No state in 1935 had authority to set rates or burden the transmission of interstate electric power for resale, and it was not the intention of Congress in § 201(b) to create such authority.

The legislative history of the Federal Power Act, Part II, provides lucid testimony to the meaning of § 201(b). Throughout the extensive legislative debates, which were conducted from May 29 to July 1, 1935, and occupied 414 pages of the *Congressional Record*, there is but one direct reference to § 201(b). That reference is to "certain rights which [states] have over *exportation* of hydroelectric energy. . . ." 79 Cong.

Rec. 10527 (1935) (emphasis supplied). Senator Wheeler of Montana, who managed the legislation in the Senate, placed the sections of the Act into perspective when he said of Title II (dealing with the Federal Power Commission):

> Mr. President, I do not think I shall go into a discussion of Title II of the bill. In the committee there was very little if any discussion with reference to it. It merely amends the present law, and gives the Federal Power Commission the right to regulate the interstate transmission of and wholesale rates for electrical energy and extends control over the waters of this country over which the Congress of the United States has control already. 79 Cong. Rec. 8444 (1935).

Congress was duly mindful of the issues of federalism involved in enactment of the Federal Power Act. It drew lines of authority based on the distinctions judicially set forth in *Attleboro*. As Congressman Lea of California observed, "It is declared that the Federal Government is to have jurisdiction over the regulation of transmission of electricity in interstate commerce, and sales at wholesale in interstate commerce." 79 Cong. Rec. 10377 (1935). Moreover, it was recognized, undoubtedly as a result of *Attleboro*, that "into that unrelated field, where the States have little or no control, . . . the bill, as far as operating concerns are affected, places the Federal Government in control." 79 Cong. Rec. 10377 (1935).[6]

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[6] Review of the debate reveals some Congressional concern over the preservation of state authority. 79 Cong. Rec. 10377. But there was no substantial objection to federal control of interstate wholesale rates and of transmission facilities, since these were not viewed as regulated by the states. This was an accurate view of state regulation at the time in light of *Attleboro*, as later confirmed by *Public Utilities Commission of California*.

The Congressional debates reflect more concern about state or federal jurisdiction of generating facilities than any other subject in this area. In 1935 Congress left such regulation to the states, even though power generated at those facilities may cross state lines.

This analysis of Section 201(b) by no means renders it a Congressional exercise in futility. At the time of enactment, in addition to exportation, regulation of generating facilities, permitting of facilities on non-navigable waterways, or waterways otherwise not subject to the Act, and interstate rates for direct sales to consumers (by the importing state), were viewed as legitimately within the jurisdiction of the states, even though power generated from the facilities entered interstate commerce. See 79 Cong. Rec. 10377 (1935). From this narrow perspective, § 201(b) could be viewed as saving from federal preemptive power state authority over hydroelectric generating facilities and the volume of exportation.

But the action proposed by the State of New Hampshire exceeds this reserved power. For control over the volume of exportation is permissible only to the extent it may be necessary to serve the legitimate purposes of a state under its historic police powers, such as to ensure adequacy of energy supply to its citizens. The "distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud . . ., and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage . . ." *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 533, explains the limits of control retained by New Hampshire over the "exportation" of hydroelectric power. To the extent necessary to protect the public health and welfare of its citizens by preserving adequacy of supply,[7] New Hampshire would be permitted under the Commerce Clause, and without limitation by *Attleboro*, to control the volume of exportation of the energy produced by its own waters. Such authority would have been lawfully exercised

[7] It must be recalled that in 1935 pooling arrangements such as NEPOOL, which now ensure to all states adequacy of supply, were not yet in existence.

prior to Part II of the Federal Power Act, and § 201(b) simply preserved it intact. But the Commerce Clause has never permitted an exercise of such authority inhibiting interstate commerce to create a local economic advantage. The New Hampshire PUC proposes to affect interstate commerce directly by reapportioning the economic benefits of the hydroelectricity generated in the State, so that its consumers exclusively receive the advantages through lower wholesale rates. It is apparently of no consequence to the PUC that this conduct increases wholesale rates in Rhode Island and Massachusetts.

This Court has often repeated the admonition that "[t]he states may act . . . only when Congress has specifically granted permission for the exercise of this state power over articles moving interstate which would otherwise be immune." *Public Utilities Commission of California*, 345 U.S. at 304. See also *In Re Rahrer*, 140 U.S. 545 (1891), and *Lewis v. B. T. Investment Managers, Inc.* 447 U.S. at 44 (and cases cited therein). Section 201(b) is no such grant of Congressional power to the State of New Hampshire.

Conclusion.

When the framers of the Federal Constitution undertook to create a common government of the diversified interests of the several states, they well understood that the imposition of economic barriers by one state against its neighbors would quickly spell the end of the union. A proscription against economic parochialism, inherited from the principles of the Fourth of the Articles of Confederation, has therefore become integral to constitutional application intended to prevent such balkanization of interests.

To permit the states to determine whether the flow of commerce may be halted at its borders in order to provide for the

economic advantage of its own citizens would threaten the national solidarity by provoking retaliation. Should New Hampshire, in order to improve the economic standing of its electricity consumers, be permitted to do so at the expense of the citizens of Massachusetts and Rhode Island, then the justification is created for Massachusetts in turn to limit the construction of new utilities, on grounds perhaps of their costs to public health or the environment, to only those necessary to serve the needs of its own citizens. Or Rhode Island, presuming it a net exporter of electricity, may determine that the more expensive oil-generated electricity produced in-state may not be sold to local utilities, thereby exercising only its rightful authority over a purely intra-state matter. To allow a state to so favor its own would be to encourage such divisive retaliation by its neighbors, and thereby to undermine the unity of purpose which is not only central to the regional energy solution provided by the concept of energy pools, but is also present in every fiber of our national cloak of government.

To ensure an adequate energy supply at the lowest economic and environmental costs is a concern not of local or statewide, but of national proportion. To permit New Hampshire simply to export to Massachusetts and Rhode Island its share of a national burden runs directly counter to the basic tenets of our federal union.

For the reasons stated above, the *amicus* parties submit that the decision of the Supreme Court of New Hampshire should be reversed.

Respectfully submitted,

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